

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT
17.8.102, 17.8.301, 17.8.901, 17.8.1007,) )	
17.8.1201, 17.8.1206, and 17.8.1212 )	(AIR QUALITY)
pertaining to incorporation by reference )	
of current federal regulations and other )	
materials into air quality rules )	

TO: All Concerned Persons

1. On July 17, 2008, the Board of Environmental Review published MAR Notice No. 17-271 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 1371, 2008 Montana Administrative Register, issue number 13. On August 28, 2008, the board published MAR Notice No. 17-274 regarding a Notice of Second Hearing and Extension of Comment Period on Proposed Amendment of the above-stated rules at page 1743, 2008 Montana Administrative Register, issue number 16.

2. The board has amended ARM 17.8.301, 17.8.901, 17.8.1007, 17.8.1201, 17.8.1206, and 17.8.1212 exactly as proposed and has amended ARM 17.8.102 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES

(1) remains as proposed.

~~(2) If EPA or a federal court of competent jurisdiction vacates, or otherwise nullifies, any emission standard, in whole or in part, incorporated by reference pursuant to ARM 17.8.103(1)(a) through (j), the affected emission standard or part thereof shall not be effective after the date of any such decision.~~

(3) through (4)(d) remain the same, but are renumbered (2) through (3)(d).

3. The following comments were received and appear with the board's responses:

COMMENT NO. 1: A commentor stated, in opposition to the proposed new ARM 17.8.102(2), that rulemaking actions by the U.S. Environmental Protection Agency (EPA) and vacatures of federal regulations by federal courts should not be automatically accepted as appropriate for Montana and that the board should, instead, undertake its own rulemaking to determine whether federal regulatory changes are appropriate and necessary. The commentor stated that, if Montana law automatically conformed to an invalidated standard that is more stringent than a pre-existing standard, Montana would be deprived of the opportunity to determine whether it is appropriate to maintain the more stringent standard. The commentor stated that, when an invalidated standard is less stringent than a pre-existing standard, the more stringent federal standard pre-empts Montana law while the state

determines how to proceed and that, therefore, an automatic rule change is not necessary in order for the state to maintain primacy over its air quality program. Finally, the commentor stated that automatically changing state rules in response to nullification of federal regulations by a federal court could result in regulatory uncertainty and administrative headache because the court's decision later could be overturned on appeal.

RESPONSE: When the board adopts and incorporates by reference federal regulations, including emission standards, it is doing so to: ensure that Montana's air quality rules are at least as stringent as federal air quality regulations; to maintain primacy over implementation of Montana's air quality program; and to timely implement emission standards that have been developed on the federal level. When the board finds that it is appropriate to adopt a separate state rule, including an emission standard such as the recent mercury emission standard adopted by the board, the board adopts a state rule through a separate rulemaking proceeding. The proposed new ARM 17.8.102(2) would not change that process or deprive the board of the opportunity, within the restrictions of state and federal law, to adopt different or more stringent state rules that the board finds are appropriate and reasonably necessary. Rather, the proposed new subsection would be consistent with the incorporation by reference process. When the board has adopted and incorporated by reference a federal regulation because it is an existing federal air quality requirement, it is consistent to nullify that incorporation by reference when the regulation has been rescinded by EPA or vacated by a federal court.

The proposed new subsection was intended to provide greater regulatory certainty and a more efficient rulemaking process by providing immediate nullification of rescinded or vacated federal emission standards rather than having a significant interim period between annual incorporation by reference updates when a standard would have to be implemented by the department and the regulated community on the state level, despite having been nullified on the federal level. Over the last several years, numerous federal emission standards have been vacated by federal courts based on findings that the federal regulations did not conform to requirements of the Federal Clean Air Act (FCAA). In most of these instances, the challenge that led to court vacature was the claim that the federal standard was not as stringent as required by the FCAA. The proposed new rule subsection would prevent implementation of emission standards on the state level that have been found, on the federal level, to violate the FCAA. Also, the proposed new subsection would prevent situations where a regulated entity is required to install equipment or make operational changes that no longer would be necessary after the board's next annual update to the incorporation by reference rules, or, more significantly, install inadequate control equipment that might influence future regulatory decisions regarding appropriate air pollution control requirements for the facility.

The commentor assumes that, when a court nullifies a federal standard that is less stringent than a pre-existing federal standard, the pre-existing standard automatically would be in force on the federal level and would pre-empt state law, making it unnecessary to change state rules in order to maintain primacy. This is not correct. State primacy is based on the provisions of the Clean Air Act of Montana, rules adopted by the board implementing that act, board orders, and other

actions that have been approved by EPA. While a court decision might or might not reinstate a more stringent federal standard that had been superseded by EPA rulemaking, this would have no effect on Montana's incorporation by reference of the less stringent federal standard. Without a rule automatically nullifying the vacated less stringent federal standard, it would be necessary for the board to initiate and complete a separate rulemaking process to adopt the more stringent standard. In the meantime, the department and board would be required to enforce the less stringent rule.

However, based on issues that arose during the rulemaking proceeding, the board has not adopted the proposed new ARM 17.8.102(2), pending re-evaluation of the proposed language, which may be interpreted in a way that creates regulatory uncertainty regarding the applicable emission standards.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff  
DAVID RUSOFF  
Rule Reviewer

By: /s/ Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, October 14, 2008.